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No. 99-6218

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILBERT K. ROGERS,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Tennessee Supreme Court's retroactive application of its decision abolishing the common law year-and-a-day rule to petitioner's case denied him due process of law in violation of the Fourteenth Amendment.

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STATEMENT OF THE CASE

1. Following a jury trial in the Criminal Court of Shelby County, Tennessee, petitioner Wilbert Rogers was convicted of the second degree murder of Ira James Bowdery, in violation of Tenn. Code Ann. § 39-13-210(a)(1) (1991).[1] He was sentenced to 33 years' imprisonment. R. Vol. I, 34-38.

The evidence at trial showed that, on the night of May 7, 1994, Bowdery was asleep with his girlfriend, Lisa Sledge, in her bedroom, when Rogers entered the room and attacked Bowdery with a butcher knife. The three had been playing cards and drinking beer at Sledge's Memphis apartment earlier that evening. R. Vol. II, 15-17; 40-41. Bowdery and Sledge left Rogers sleeping in the living room when they went upstairs to bed. R. Vol. II, 17-19. According to Sledge, she awoke to the noise of someone jiggling the knob of her bedroom door. R. Vol. II, 20. Thinking that Rogers had probably come upstairs in search of the bathroom, she got up to open the door. *Id.* Rogers, wielding a butcher knife taken from Sledge's kitchen, immediately pushed her aside, said, "Where's

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[1] The statute provides, in pertinent part, that "[s]econd degree murder is . . . [a] knowing killing of another." The mens rea of "knowing"

> refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Tenn. Code Ann. § 39-11-302(b) (1991).

that nigger at" and "Where's my money at," and "went for" Bowdery with the knife. *Id.* Sledge saw Rogers stab Bowdery and then "a lot of blood." Bowdery was bleeding from his hands, his chest, and his stomach. R. Vol. II, 22-23.

Sledge ran screaming from her apartment to a telephone on the corner and dialed 911. R. Vol. II, 23-25. She saw Rogers leaving the scene. R. Vol. II, 24-25. Meanwhile, Bowdery, bleeding and unclothed, staggered to the nearby home of his friends, Jimmy and Dianna Reed, and banged on the front door. R. Vol. II, 75-77. After Mrs. Reed let him in, Bowdery told her twice, "He stabbed me," and then collapsed on the couch in the living room. R. Vol. II, 76-77. The Reeds called an ambulance. R. Vol. II, 77-78.

Rogers later boasted about the attack to two coworkers that he "went in the kitchen and got two butcher knives and went upstairs like Jason, and stabbed this dude." He explained that he did it because, when he awoke that evening, he discovered he was missing 13 or 14 dollars. R. Vol. II, 68; 93-94.

Bowdery survived in a vegetative state until August 1995, when he contracted a kidney infection as a complication of his condition and died. R. Vol. II, 139; 142. Dr. Jerry Francisco, the Shelby County Medical Examiner, testified that Bowdery went into cardiac arrest as a result of a stab wound to the heart and that, before doctors could restart his heart and reestablish circulation, Bowdery developed hypoxia of the brain, with the result that "the higher brain functions no longer existed." R. Vol. II, 138-39. The cause of death was "cerebral hypoxia, which

means loss of oxygen to the brain . . . secondary to a stab wound to the heart." R. Vol. II, 140.

2. On appeal, Rogers claimed for the first time that the common law year-and-a-day rule precluded his conviction for murder because his victim had survived more than a year and one day after the brutal stabbing that caused his death. A panel of the Tennessee Court of Criminal Appeals unanimously affirmed the conviction. Following prior case law of that court,[2] the panel characterized the year-and-a-day rule as a common law defense and determined that all common law defenses in Tennessee had been abolished by the Criminal Sentencing Reform Act of 1989, specifically Tenn. Code Ann. § 39-11-203(e)(2) (1997).[3] J.A. 9. Accordingly, the panel concluded that "the 'year-and-a-day' rule defense is no longer viable in Tennessee." *Id.* Noting that Rogers committed his crime five years after the enactment of this legislation, the panel also rejected Rogers' claim that the abolition of the rule created an ex post facto violation in his case. *Id.*

3. Although employing a different rationale, the Tennessee Supreme Court also unanimously affirmed the conviction. The court first reviewed the historical development of the year-and-a-day rule at common law, both in England and this country, and listed the three most frequently cited justifications for the rule:

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[2] *State v. Ruane*, 912 S.W.2d 766, 774 (Tenn. Crim. App. 1995).

[3] "Defenses available under common law are hereby abolished."

> The first and most often cited justification is that thirteenth century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and the victim's death. Therefore, it was presumed that a death which occurred more than a year and one day from the assault or injury was due to natural causes rather than criminal conduct.
>
> Second, it has often been said that the rule arose from the early function of the jury as a reporter of the happenings of the vicinage. Even if expert medical testimony had been adequate to establish causation at common law, it would not have been admissible. Unlike current procedure, in early English courts, jurors were required to rely upon their own knowledge to reach a verdict, and they could not rely upon the testimony of witnesses having personal knowledge of the facts or upon expert opinion testimony.
>
> Finally, the rule has occasionally been characterized as an attempt to ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides – first degree murder and manslaughter alike.

J.A. 16-17 (citations omitted).

The court next surveyed the modern case law of other states and learned that "the rule has fallen into disfavor and has been legislatively or judicially abrogated by the vast majority of jurisdictions which have recently considered the issue" (J.A. 17-21), principally because modern medicine now makes possible a scientifically reliable determination of the cause of a victim's death,

regardless of the amount of time that has passed since his or her injury at the hands of the perpetrator. The court also determined from these decisions that the rule's demise in other jurisdictions, whether by legislative or judicial action, "has not altered the general principle that causation be proven beyond a reasonable doubt." J.A. 21. The abolition of the rule's "arbitrary time limit" after which a murder prosecution is barred "simply allows the State to have the opportunity to attempt to prove causation." *Id.*

Turning to the status of the rule under Tennessee law, the court disagreed with the intermediate appellate court's conclusion that the rule was a common law defense and had therefore been abrogated by the provisions of the 1989 Criminal Sentencing Reform Act abolishing all such defenses in the state. "While similar in some respects to a defense in the sense that it precludes a conviction," the court observed, "the year-and-a-day rule is even more powerful than a defense because it entirely precludes a murder prosecution." J.A. 23. The court likewise rejected the State's position that the 1989 Act should be deemed to have abrogated the rule because the legislature omitted any reference to it when defining the elements of criminal homicide. In so doing, the court relied upon the provisions of the 1989 Act directing that common law judicial decisions and interpretive rules be consulted when applying the Act, as well as upon canons of statutory construction requiring that statutes in derogation of the common law be strictly construed and that criminal statutes be construed against the State and in favor of the defendant. J.A. 23-24.

Having thus concluded that the year-and-a-day rule was not abolished by the legislature's comprehensive revision of Tennessee's criminal code in 1989, the court next considered whether and how the rule should be modified. Recognizing a "special duty" to reevaluate "obsolete common law doctrines" when "it is the Court, rather than the Legislature, which has recognized and nurtured the common law rule," the court believed judicial reconsideration "particularly appropriate" in this instance. J.A. 24 (internal quotation marks and citations omitted). In the court's view, it was unnecessary to leave the matter to the legislature, because "the year-and-a-day rule . . . has in fact never been a part of the statutory law of" Tennessee. *Id.*

Since "the reasons which prompted common law courts to recognize the rule no longer exist" (*id.*), the court declared the year-and-a-day rule abolished in Tennessee. Causation in homicide cases can now be accurately assigned, thanks to advances in medical science; modern evidentiary rules now permit juries to consider the opinions of experts on such issues; and the death penalty is now reserved only for cases of first degree murder under comprehensive substantive and procedural limitations. J.A. 24-25. The court also refused to adopt "a substitute time limit" to replace the rule. "[N]o arbitrary time frame is needed," the court decided, "because abolition . . . does not relieve the State of its burden of proving causation beyond a reasonable doubt," a safeguard deemed "sufficient to satisfy due process." J.A. 25-26.

The court applied its decision abolishing the year-and-a-day rule to Rogers' case and affirmed his conviction. Overruling Rogers' objection that to do so would

violate the Ex Post Facto Clauses of the United States and Tennessee Constitutions, the court initially noted that "both the federal and state constitutional provisions [prohibiting ex post facto laws] refer only to legislative acts," not judicial decisions. J.A. 27. Accordingly, the court addressed Rogers' claim under this Court's decisions in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), to determine whether retrospective application of its abolition of the rule in Rogers' case would offend the due process guarantees of the Fifth and Fourteenth Amendments. *Id.*

Several factors persuaded the court that its decision abrogating the rule was not "unexpected and unforeseeen" (J.A. 28) and could therefore be applied retroactively consistent with *Bouie* and *Marks*. Most significantly, the court's research disclosed that the year-and-a-day rule "has never served as the ground of decision in any Tennessee case" and, indeed, had been mentioned favorably by a Tennessee court only twice in the twentieth century, the last time more than twenty years ago. J.A. 27-28. In addition, the court acknowledged "the uncertainty surrounding the continuing viability of the rule in light of the passage of the 1989 Act," which had led the lower appellate courts in Tennessee actually to find that the rule had been legislatively abrogated in 1989. J.A. 28. The court also believed that its decision in this case had been clearly foreshadowed by the weight of authority from other jurisdictions disapproving the rule, "which has been abolished by every court which has squarely faced the issue" in a line of decisions commencing long before Rogers' crime. *Id.* Finally, the court emphasized that "abolition of the rule does not allow the

State to obtain a conviction upon less proof, nor does its abolition impose criminal sanctions for conduct that was heretofore innocent." *Id.* For all of these reasons, the court concluded that its abolition of the year-and-a-day rule "does not constitute an unforeseeable judicial enlargement of a criminal statute" and may be applied retroactively. *Id.*

SUMMARY OF ARGUMENT

Petitioner contends that the Tennessee Supreme Court has unforeseeably, retroactively and, therefore, unconstitutionally enlarged Tennessee's prohibition against criminal homicide by abolishing the common law year-and-a-day rule and by applying that change in the law to his case. Invoking this Court's decisions in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), he apparently believes that he should have been entitled to rely on the continuing vitality of the rule at the moment he decided to plunge a butcher knife into the victim's chest, as well as from and after the date on which the rule would have operated to bar his prosecution for homicide – that is, once Mr. Bowdery had survived his wounds for more than a year and one day after petitioner's attack. He also suggests that *Bouie* incorporated the specific prohibitions of the Ex Post Facto Clause into the Due Process Clause of the Fourteenth Amendment so as to render the former fully applicable to judicial rulings and to transform the judgment below into a forbidden ex post facto law.

But the year-and-a-day rule, properly understood, has never been deemed an element of the crime of homicide in Tennessee, and its abolition has not altered the scope of conduct punishable as homicide. While no Tennessee case affirmatively discloses the nature of the Tennessee rule or how it might have operated had it been applied before its abolition, several factors compel the conclusion that the rule was merely an exclusionary rule relating to causation and not an element of homicide. First, prior to the enactment of statutory offenses in Tennessee, the Tennessee courts did not incorporate the year-and-a-day requirement as an element in defining the offense of murder. Second, the year-and-a-day rule has never been included in a statutory definition of homicide in Tennessee. Third, the rule has never been included in pattern jury instructions frequently used as a source of instructions in the state's trial courts. Finally, had the common law rule been an element of homicide, the Tennessee Supreme Court would have been expressly forbidden by the state constitution from abolishing it on its own. Indeed, in this case the Tennessee Supreme Court's rejection of the argument that the rule was abolished when it was not included in the statutory definition of homicide in the most recent criminal code – despite the code's clear statement that conduct does not constitute an offense unless so defined – and its description of the effect of the rule's abolition – that it "simply allows the State the opportunity to attempt to prove causation" – are consistent with the conclusion that the rule was evidentiary, not elemental.

Because the rule was not an element of homicide and did not define criminal conduct, the "reasonable murderer" should not be heard to complain either that he relied on the existence of the rule as a shield against criminal liability for his acts when he committed them or that a later judicial abandonment of the rule has violated the holding of *Bouie* by denying him "fair warning" that he might be prosecuted and punished for homicide. *Bouie* and its progeny held that a criminal defendant is denied "fair warning" by a novel judicial construction that broadens the scope of a criminal statute to include conduct that no person could reasonably understand to be proscribed by the statutory language itself or by prior judicial constructions of it.

The Tennessee Supreme Court's decision in this case does not even implicate the *Bouie* "fair warning" principle, much less offend it. First, the decision below has not broadened the scope of a criminal statute because the second degree murder statute under which petitioner was convicted simply prohibits the "knowing killing of another" without requiring the perpetrator to be aware that his acts will cause death within a particular time frame. Second, any person of ordinary intelligence would have understood, whether based on the very nature of the contemplated conduct or on a reading of Tennessee's statutory definition of second degree murder, that knowingly stabbing another in the heart was likely to subject him to criminal prosecution, conviction, and punishment. Third, the practical inability of a person contemplating murder to predict whether the year-and-a-day rule will shield him from prosecution and the characteristic fluidity of the common law itself make any reliance interest

in the continued viability of the rule particularly negligible. Finally, because the common law decisions of each state's courts have always informed the decisions of every other state's courts called upon to apply the same principles, the virtually unanimous abandonment of the year-and-a-day rule by the courts of other states provided notice to petitioner that Tennessee would most likely abolish the rule.

Nor should *Bouie* be read to support petitioner's extraordinary assertion that the technical restrictions imposed by the Ex Post Facto Clause upon penal legislation have been imported wholesale into the due process guarantee and now apply to the courts, a proposition squarely at odds with this Court's repeated pronouncements on the subject dating from *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). While *Bouie* did observe that the retroactive application of an unforeseeable judicial enlargement of a criminal statute operates "like" an ex post facto law, the doctrinal source of the holding clearly is the due process principle that a criminal statute must give fair warning of what conduct it makes criminal. Furthermore, the Court's focus on the innocent character of the *Bouie* defendants' conduct – wholly irrelevant to an ex post facto analysis – and the implausibility of the notion that this Court intended to overrule, without saying so, two hundred years of precedent establishing that the Ex Post Facto Clause does not regulate judicial decision-making belie any intention of the Court to import the Ex Post Facto Clause into the Due Process Clause to regulate judicial action. Indeed, an observation of the fundamental differences between legislatures and courts and a recognition of the impact such a change would have on values

of judicial economy, federal-state comity, and the separation of powers persuasively demonstrate why any such importation should be rejected.

Nevertheless, even if two centuries of precedent are overlooked and this case is analyzed under the Ex Post Facto Clause, the decision below does not violate either the letter or the spirit of that prohibition. The Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule does not violate any of the four *Calder* categories describing prohibited ex post facto laws. Because the rule does not define criminal conduct and was never a defense to a charge of homicide, abolition of the rule did not operate to criminalize otherwise innocent actions after the fact. Nor did the abolition of the rule retroactively aggravate the offense or enhance the punishment for the offense in violation of the second and third *Calder* categories. The statutory offense for which petitioner was indicted, convicted and punished was second degree murder, not some lesser offense with which he might have been charged if his victim had not died. The statutory elements of second degree murder, its assigned grade in the criminal code, and the range of possible punishments for that offense have all remained unchanged after the rule's abolition. Finally, the fourth *Calder* category is not violated by the abolition of the rule because the rule, being concerned only with the timing of the victim's death, did not specify a particular "quantum of evidence" necessary to establish causation or alter the basic requirement that the State prove beyond a reasonable doubt that the defendant knowingly injured the victim and that the victim died as a result; therefore,

abolition does not allow a homicide conviction on "less, or different, testimony" than before.

ARGUMENT

THE TENNESSEE SUPREME COURT'S RETROACTIVE ABOLITION OF THE COMMON LAW YEAR-AND-A-DAY RULE DID NOT DENY PETITIONER DUE PROCESS OF LAW

A. Under Tennessee Law, the Year-and-a-Day Rule Was Not an Element of Homicide

1. *Origins of the Rule at Common Law*

At common law, if more than a year and a day intervene between the injury and the death of the victim, the injury is not legally deemed the cause of death, and the person who inflicted the injury is not criminally responsible for the homicide. 40 C.J.S. *Homicide* § 9 (1991). The origins of the rule are obscure.

The first mention of a year-and-a-day rule came in 1278 in the English Statute of Gloucester, regulating, *inter alia*, appeals of death, one of the common law remedies for murder.[4] Donald E. Walther, *Taming A Phoenix: The Year-And-A-Day Rule in Federal Prosecutions for Murder*, 59 U. Chi. L. Rev. 1337, 1338 (1992). An appeal of death was

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[4] The other remedies were indictment at the suit of the King, later becoming in England and the United States public prosecution, and inquisition against deodands, involving the forfeiture of personal chattels that had caused death. *Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501, 503 (1960).

a private and vindictive process for wrongful death, originating as a custom of the ancient Germans allowing a pecuniary satisfaction, called a "weregild," to the injured party or his relatives "to expiate enormous expenses." 4 W. Blackstone, Commentaries *312-13 (1769). By the Statute of Gloucester, the prosecution of appeals of death was limited. Chapter 9 of the statute provides:

> Of Homicide in Self-Defence, or by Misfortune. Of Appeals of Murther.
>
> The King Commandeth that no Writ fhall be granted out of the Chancery for the Death of a Man to enquire whether a Man did kill another by Misfortune, or in his own Defence, or in other Manner without Felony; but he fhall be put in prison until the coming of the Juftices in Eyre, or Juftices affigned to the Gaol-delivery, and fhall put himself upon the Country before them for Good and Evil; and if it be found by the Country, that he did it in his Defence, or by Misfortune, then the Juftices fhall inform the King thereof, and the King shall take him to his Grace, if it pleafe him.
>
> It is provided alfo, that no Appeal fhall be abated fo foon as they have been heretofore; but if the Appellor declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon he was flain, the Appeal shall ftand in effect: And no Appeal fhall be abated for Default of frefh Suit, if the Party fhall fue within the Year and the Day after the Deed done.

Statute of Gloucester, 1278, 6 Edw. 1, ch. 9 (Eng.), codified at 1 Statutes at Large 131 (1811) (footnotes omitted). According to the generally accepted interpretation, the

Statute of Gloucester operated like an ordinary statute of limitations, running from the death, not the injury. *Commonwealth v. Lewis*, 381 Mass. 411, 409 N.E.2d 771, 772 (1980). While at the outset there was some disagreement over whether the time should run from the blow or the death of the victim (Note, *The Abolition of the Year and a Day Rule: Commonwealth v. Ladd*, 65 Dick. L. Rev. 166, 167 (1961)), in *Heydon's Case*, 4 Coke's Reports 41, 76 Eng. Rep. 631 (1558), it was held that the time was to run from the day of death. Accordingly, Blackstone concluded that all appeals of death were required to be "sued within a year and a day after the completion of the felony by the death of the party."[5] 4 W. Blackstone, Commentaries *311.

The private appeal of death gradually became obsolete[6] and gave way to the Crown prosecution by indictment, which was unencumbered by a statute of limitations.[7] *State v. Pine*, 524 A.2d 1104, 1106 (R.I. 1987). At some point, the year-and-a-day rule made this transition as well – not as a procedural statute of limitations, but as a principle of law in homicide cases. It has been suggested that this transition may have resulted from misinterpretation (*State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310, 313 (1984)), or ignorance. Walther, *supra*, at 1339.

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[5] But Sir Edward Coke stated that the time for bringing the appeal ran from the blow, not the death. 3 Coke, Institutes of Laws of England 47, 52 (c. 1620).

[6] The appeal of death was formally abolished in England in 1819. 59 Geo. 3, ch. 46, codified at 39 Statutes at Large 153-154 (1819).

[7] At common law, the principle of "Nullum tempus occurrit regi" – "time does not run against the king" – applied. *See Doggett v. United States*, 505 U.S. 647, 667 (1992).

Although it is unclear when and why the transition occurred, the common law rule has been referred to and defined in works compiling and explaining the English common law. Sir Matthew Hale's History of the Pleas of the Crown (1736) together with William Hawkins' Pleas of the Crown (1716) are said to form the basis of the modern criminal law. H. Potter, An Historical Introduction to English Law 249 (2nd ed. 1943). Hale refers to the rule in his treatise:

> If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of his wound within the year and a day, it is homicide or murder, as the case is, and so it hath been always ruled.

1 Hale, History of the Pleas of the Crown, ch. 33 at 428 (1736). Hawkins also refers to the rule:

> Also it is agreed, that no person shall be adjudged by any act whatever to kill another who doth not die thereof within a year and a day after; in the computation whereof, the whole day in which the hurt was done shall be reckoned the first.

Elliott v. Mills, 335 P.2d 1104, 1107 (Okla. Crim. App. 1959) (quoting 1 Hawkins' Pleas of the Crown, ch. 13, § 9 (8th ed. 1824)).

Lord Coke included the rule in his definition of murder:

> Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with

> malice aforethought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same.

3 Coke, Institutes at 47. Blackstone, purporting to recite Coke's definition, did not include the rule:

> Murder is, therefore, now thus defined or rather described by Sir Edward Coke: when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.

4 Blackstone's Commentaries *195. But two pages later, Blackstone remarks:

> In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered.

Id. at 197.

As the Tennessee Supreme Court noted in its opinion below (J.A. 16-17), three justifications are generally offered for the common law rule. By far the most frequently discussed is that medical science was incapable of establishing causation when a considerable lapse of time intervened between the injury and the victim's death. *See People v. Snipe*, 25 Cal. App. 3d 742, 102 Cal. Rptr. 6, 7 (1972); *United States v. Jackson*, 528 A.2d 1211, 1216 (D.C. 1987); *Jones v. Dugger*, 518 So.2d 295, 296 (Fla. App. 1987); *State v. Cross*, 260 Ga. 845, 401 S.E.2d 510, 511 (1991); *People v. Carrillo*, 164 Ill. 2d 144, 207 Ill. Dec. 16, 646 N.E.2d 582, 584 (1995); *Lewis*, 409 N.E.2d at 773; *People v. Stevenson*, 416 Mich. 383, 331 N.W.2d 143, 145 (1982);

State v. Gabehart, 114 N.M. 183, 836 P.2d 102, 105 (1992); *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991); *Hefler*, 310 S.E.2d at 313; *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio Ct. C. P. 1977); *Ladd*, 166 A.2d at 506; *Ruane*, 912 S.W.2d at 774; *Pine*, 524 A.2d at 1106. This justification follows the reasoning of Lord Coke, who said that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of a stroke or poyson, etc., or a natural death; and in case of life, the rule of law ought to be certain." 3 Coke, Institutes at 53.

Second, the rule is sometimes traced to the early function of the jury as witnesses of events in the vicinage. Under this early English practice, jurors were required to rely on their own knowledge to reach a verdict, without resort to expert medical testimony; and they would not have had sufficient knowledge to trace cause to effect over a sizeable time interval. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 773; *Stevenson*, 331 N.W.2d at 145-46; *Sandridge*, 365 N.E.2d at 899.

Finally, the rule has occasionally been described as an attempt to mitigate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides. *Jackson*, 528 A.2d at 1216; *Lewis*, 409 N.E.2d at 733; *Hefler*, 310 S.E.2d at 313; *Ladd*, 166 A.2d at 506.

The rule has been characterized variously by American state courts as a rule of evidence (*People v. Clark*, 106 Cal. App. 2d 771, 235 P.2d 56, 59-60 (1951); *State v. Huff*, 11 Nev. 17 (1876); *Commonwealth v. Evaul*, 5 Pa. D. & C. 105, 106 (1922); 40 C.J.S. *Homicide* § 10 (1991); 40 Am.

Jur.2d *Homicide* § 14 (1999)); an element of the offense (*State v. Young*, 77 N.J. 245, 390 A.2d 556, 559 (1978)); a rule of evidence and procedure (*Head v. State*, 68 Ga. App. 759, 24 S.E.2d 145, 147 (1943); *Ladd*, 166 A.2d at 504)); a rule of "procedure, pleading as well as evidence" (*Elliott*, 335 P.2d at 1111-12)); a conclusive presumption (*State v. Brown*, 21 Md. App. 91, 318 A.2d 257, 261 (1974); *State v. Orrell*, 12 N.C. 139, 141 (1826); Walther, *supra*, at 1349)); and a rule of substantive law. *People v. Corder*, 360 Ill. 264, 137 N.E. 845, 849 (1922); *State v. Moore*, 196 La. 617, 199 So. 661, 662-63 (1940); *State v. Zerban*, 617 S.W.2d 458, 458-59 (Mo. 1981); *Gabehart*, 836 P.2d at 105-06.

Significantly, this Court has described the rule as one of evidence (*Louisville, E. & St. L. R. Co. v. Clarke*, 152 U.S. 230, 241 (1894) ("In prosecutions for murder, the rule was one simply of criminal evidence")), and as one of pleading. *Ball v. United States*, 140 U.S. 118, 132 (1891) (declaring murder indictment "fatally defective" for failure to aver time and place of death, and noting that "by the common law both time and place of death were required to be alleged" to show jurisdiction in the court).

2. *The Rule in Tennessee*

Although "the common law of England as it stood at and before the separation of the colonies" has been adopted by the State of Tennessee (*Smith v. State*, 215 Tenn. 314, 385 S.W.2d 748, 750 (1965)), the common law year-and-a-day rule has not played any role in Tennessee jurisprudence. Before this case, the rule had been mentioned in only three appellate opinions. The discussion of the rule in each of these opinions is dicta.

In *Percer v. State*, 118 Tenn. 765, 103 S.W. 780 (1907), the Tennessee Supreme Court reversed the defendant's second degree murder conviction because the defendant was not present in court when the verdict was announced and because the proof failed to show that the murder occurred prior to the finding of the indictment. *Id.*, 103 S.W. at 782-83. In passing, the court simply stated, quoting Wharton on Homicide, that "[i]n murder, the death must be proven to have taken place within a year and a day of the injury received." *Id.*, 103 S.W. at 783. This is the only mention of the rule by the Tennessee Supreme Court in any prior case.

Sixty-seven years passed before the rule was referred to again. In *Cole v. State*, 512 S.W.2d 598 (Tenn. Crim. App. 1974), the Court of Criminal Appeals affirmed the defendants' convictions for involuntary manslaughter. The two defendants were drag racing when one of the vehicles struck the automobile driven by the victim, who died shortly after he was taken to a hospital emergency room. Although there was no issue that the victim had died within a year and a day of the injury, the court remarked: "The common law provides that death must ensue within a year and a day from the infliction of the mortal wound to constitute punishable homicide." *Id.* at 601.

Finally, twenty-one years later, the rule was mentioned in *State v. Ruane, supra*. Although there was no dispute that the second degree murder victim died ten days after being shot by the defendant, the court observed that "[a]t common law, the proof must have established that the victim died within a year and a day from the date of the injury received." *Id.* at 774. The court opined that, in any event, the common law rule had been

abolished by the 1989 Criminal Sentencing Reform Act (Tenn. Code Ann. §§ 39-11-101, *et seq.* (1991)), since it was not specifically listed as a statutory affirmative defense. *Id.*

None of these Tennessee cases affirmatively discloses the nature of the Tennessee rule or how it might have operated had a Tennessee court ever been required to apply it before its abolition in this case. Yet several factors compel the conclusion that the rule was not an element of homicide, but was merely an exclusionary rule of evidence relating to causation, *i.e.*, unless the victim died within a year and a day, the prosecution was not permitted to offer proof that he died of the injury received.

First, prior to the enactment of the first homicide statute in 1829 (*see* 1829 Tenn. Pub. Acts, ch.23), which created the statutory offense of murder and divided it into degrees, the crime of murder was defined by case law. In *Fields v. State*, 9 Tenn. 156 (1829), the Supreme Court of Errors and Appeals set forth the elements of common law murder in Tennessee. Justice Whyte, quoting Lord Coke, opined that murder is " 'where a person of sound mind and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought either express or implied.' " *Id.* at 159. Justice Peck, also quoting Lord Coke, declared that murder " 'is when a man of sound memory and of the age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature in rerum natura, under the king's peace, with malice aforethought, either express or implied.' " *Id.* at 162. Neither definition incorporates the year-and-a-day requirement as an element of murder,

despite the fact that Lord Coke specifically included it in his definition. *See* 3 Coke, Institutes at 47. Although the "year-and-a-day" rule was part of the common law in Tennessee, it was obviously not viewed as an element of murder by the early Tennessee courts.

Second, the year-and-a-day rule has never been included in a statutory definition of homicide in Tennessee. *See* Code of Tennessee § 4597 (1858); Shannon's Code of Tennessee § 6438 (1918); Code of Tennessee § 10767 (1931); Tennessee Code Annotated §§ 39-2401 (1955 & 1975); 39-2-210 (1982); 39-13-210 (1991 & 1997). Indeed, in rejecting respondent's concession below that the rule was a substantive principle of law necessarily abolished by the enactment of a new criminal code in 1989 because not included there as part of the definition of homicide (J.A. 22-24), the Tennessee Supreme Court must be deemed to have rejected any notion that the rule was an element of homicide. Petitioner here concedes as much when he insists that the rule "has no bearing upon either the actus reus or mens rea of a criminal offense" (Brief at 22) and, therefore, could not have been abolished by the 1989 Criminal Code. *See* Tenn. Code Ann. § 39-11-102(a) (1997) ("Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute.")

Third, the Tennessee Pattern Jury Instructions, prepared by a committee of the Tennessee Judicial

Conference[8] and frequently used as a source of instructions in the state's trial courts,[9] have never included the year-and-a-day rule as either an element of homicide or an element of causation. Tennessee Pattern Jury Instructions – Criminal, 7 Tenn. Practice §§ 20.01-20.08 (Homicide), § 37.11 (Cause of Death) (1st ed. 1978); §§ 20.01-20.09 (Homicide), § 37.11 (Cause of Death) (2d ed. 1988); §§ 7.01-7.08 (Criminal Homicide) (3d ed. 1992); §§ 7.01(a)-7.10 (Criminal Homicide), § 42.14 (Cause of Death) (4th ed. 1995); §§ 7.01(a)-7.11 (Criminal Homicide), § 42.14 (Cause of Death) (5th ed. 2000). In Tennessee, the trial court has the duty of instructing the jury on the essential elements of the offenses charged, whether requested by the defendant or not. *State v. Brewer*, 932 S.W.2d 1, 16 (Tenn. Crim. App. 1996).[10]

Finally, had the common law year-and-a-day rule been an element of criminal homicide, the Tennessee Supreme Court would have been expressly forbidden by the state constitution from abolishing the rule on its own. Article XI, § 1, of the Constitution of Tennessee (1870) provides, in pertinent part, that "[a]ll laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire, be altered or repealed by the

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[8] The Tennessee Judicial Conference consists of the judges of all courts of record whose salary is paid in whole or in part out of the state treasury. Tenn. Code Ann. § 17-3-101 (1994).

[9] *State v. Rutherford*, 876 S.W.2d 118, 120 (Tenn. Crim. App. 1993).

[10] Petitioner's jury was not instructed on the year-and-a-day rule. R. Vol. VI, 1-17.

Legislature. . . . " It must be assumed that the Tennessee Supreme Court fulfilled its constitutional duty. *See Harrison v. NAACP*, 360 U.S. 167, 178 (1959). Indeed, consistent with this duty, in abolishing the rule, the Tennessee Supreme Court focused on its evidentiary character, emphasizing that modern medical science had rendered the rule's concern with proof of causation obsolete. J.A. 17-21. Clearly, the court viewed the rule as evidentiary in nature:

> Therefore, regardless of whether its demise was achieved by legislation or judicial action, in other jurisdictions, abolition of the year-and-a-day rule has not altered the general principle that causation be proven beyond a reasonable doubt. *Its abolition simply allows the State the opportunity to attempt to prove causation.*

J.A. 21 (emphasis added).

B. Because the Rule Was Not an Element of Homicide and Did Not Define Criminal Conduct, Its Retroactive Abolition Did Not Deprive Petitioner of His Due Process Right to Fair Warning

Given the nature of the year-and-a-day rule, neither *Bouie v. City of Columbia, supra,* nor *Marks v. United States, supra,* supports petitioner's claim that its retroactive abolition violated his due process "right to fair warning" and invalidates his second degree murder conviction.

The defendants in *Bouie*, arrested during a "sit-in" at a drugstore lunch counter, stood convicted of criminal trespass under a South Carolina statute prohibiting "entry upon the lands of another . . . after notice from the

owner or tenant prohibiting such entry. . . . "[11] 378 U.S. at 349 (internal quotation marks omitted). Despite the absence of any evidence that they had received notice prohibiting their entry into the store before they entered, the South Carolina Supreme Court had nevertheless sustained their trespass convictions by construing the statute "to cover not only the act of entry . . . after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." 378 U.S. at 350. Because the state court's construction was "so clearly at variance with the statutory language" and had "not the slightest support in prior South Carolina decisions" applying the statute (378 U.S. at 356), this Court reversed, finding that the defendants' convictions had been procured without "the first essential of due process of law" (378 U.S. at 351 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))), namely, "fair warning that . . . contemplated conduct constitutes a crime." 378 U.S. at 355. While acknowledging the right of South Carolina's judiciary authoritatively to construe that state's penal statutes, this Court concluded that the Due Process Clause of the Fourteenth Amendment forbids retroactive application of "a judicial construction of a criminal statute" that "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. . . . " 378 U.S. at 354 (internal quotation marks omitted). When, as in *Bouie*, the defendant's acts are not even "improper or immoral," the due process right of fair warning forbids the retrospective imposition of "criminal

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[11] Section 16-386, Code of Laws of South Carolina, 1952 (1960 Supp.).

penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362. "The underlying principle," the Court explained, "is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." 378 U.S. at 351 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

Following *Bouie*, in *Marks v. United States*, 430 U.S. 188 (1977), this Court reversed the defendants' federal obscenity convictions under the Due Process Clause of the Fifth Amendment because the trial court had instructed the jury under the more expansive definition of constitutionally unprotected hard-core pornography announced in *Miller v. California*, 413 U.S. 15 (1973), after the period covered by the indictment. Comparing the *Miller* definition with the prior construction of the relevant statute adopted in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court determined that "some conduct which would have gone unpunished in *Memoirs* would result in conviction under *Miller*." *Marks*, 430 U.S. at 194. Noting the importance of "fair warning when a statute regulates expression and implicates First Amendment values," the Court concluded that *Bouie* "preclude[d] the application . . . of the standards announced in *Miller* . . . to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*." 430 U.S. at 196. *See also Rabe v. Washington*, 405 U.S. 313 (1972) (conviction reversed because based on an unforeseeable judicial expansion of conduct covered by state obscenity statute); *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that

neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.").

The decision below does not even implicate the *Bouie* "fair warning" principle, much less offend it. First and most significantly, the Tennessee Supreme Court's abolition of the year-and-a-day rule has not broadened the scope of the conduct covered by Tennessee's second degree murder statute. The statute under which petitioner was convicted warns all Tennesseans that second degree murder is "[a] knowing killing of another," Tenn. Code Ann. § 39-13-210(a)(1) (1991), and, in addition, that a person acts "knowingly with respect to conduct . . . when the person is aware of the nature of the conduct," and "knowingly with respect to a result . . . of conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b) (1991). The statutory definition of the crime thus focuses exclusively upon the perpetrator's awareness of the nature of his acts, as well as his awareness that his acts are "reasonably certain" to cause someone to die. But the words of the statute do not require the perpetrator to be aware that his acts will cause his victim to die within any particular time frame. Thus, the elimination of the year-and-a-day rule – which merely establishes an arbitrary deadline by which a victim of such acts must die and is not at all concerned with the actor's conduct or his awareness of its consequences – does not operate to expand the class of acts and mental states that qualify for prosecution under the statute.

Furthermore, the retroactive elimination of the rule cannot be said to have deprived petitioner of "fair warning" that his conduct risked prosecution under the

statute. Although "it is not likely that a criminal will carefully consider the text of the law before he murders or steals," *McBoyle v. United States*, 283 U.S. 25, 27 (1931), if petitioner had visited a law library on the afternoon preceding the crime to research the question whether stabbing another person in the heart might draw a homicide charge from the State of Tennessee, a brief glance at the criminal code would have alerted him to the legal risks of such conduct. Any person of ordinary intelligence ought to understand that inflicting a stab wound to the heart is "reasonably certain" to cause the death of the recipient, and, upon reading Tennessee's statutory definition of second degree murder, petitioner would have discovered that such conduct is subject to prosecution. On the other hand, he would not have learned anything useful from studying Lord Coke's exposition of the year-and-a-day rule. Because the rule does not address what types of conduct may give rise to liability for criminal homicide, even the most comprehensive review of the rule's origins, history and current status in all fifty states would not have supplied petitioner with the answer he was seeking.

Of course, legal texts provide only one source of "fair warning" for due process purposes; common sense also counts for something in the analysis. *See Smith v. Goguen*, 415 U.S. 566, 584 (1974) (White, J., concurring in the judgment) ("It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [conduct] . . . covered by the statute. . . . "). Unlike the conduct at issue in *Bouie*, which was neither "improper" nor "immoral" (378 U.S. at

362), and in *Marks*, which involved "a form of communication and entertainment acceptable to a substantial segment of society" (430 U.S. at 198 (Stevens, J., concurring in part and dissenting in part)), the very nature of petitioner's acts should be deemed to have supplied him with constitutionally sufficient advance notice of their criminality, notwithstanding the Tennessee Supreme Court's later withdrawal of the benefits of the year-and-a-day rule. It is simply not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). Petitioner's acts were plainly calculated to land him in the heart of criminal territory, not just "perilously close" to the border.

Nor is the decision below vulnerable to attack on the ground that it undermines some reliance interest of the petitioner that demands protection. The policy goal of *Bouie*'s "fair warning" principle is to enhance individual liberty by insuring the predictability and stability of the legal rules that define and punish criminal misconduct. "[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). But the year-and-a-day rule lacks the stuff from which "settled expectations" can reliably be constructed. As we have already emphasized, the rule conveys no information to assist an actor in locating the line between legal and illegal conduct or between lesser and greater degrees of homicide. Moreover, the event that triggers the shield from prosecution afforded by the rule – the occurrence of

the victim's death beyond a year and a day from his injury – is not typically within the perpetrator's control. For that reason, no one can claim to "rely" in any meaningful sense on the potential benefits of the year-and-a-day rule when planning a butcher knife attack. One simply cannot know in advance of launching such an attack how long the intended victim might linger after injury.[12]

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[12] Petitioner also suggests (Brief at 15) that he was entitled to rely on the rule once his victim "slipped into a coma" and that this reliance was "heightened" once his victim survived a year and one day. But the "fair warning" required by the Fourteenth Amendment is fair warning at the time of the conduct. *Bouie*, 378 U.S. at 355; *Lanier*, 520 U.S. at 259; *Hamling v. United States*, 418 U.S. 87, 115 (1974). To the extent petitioner is arguing that he acquired either a "liberty" or "property" interest in avoiding prosecution for murder that is entitled to due process protection after the passage of a year and a day, that argument was neither pressed nor passed upon below. Therefore, this Court may not consider it. *Illinois v. Gates*, 462 U.S. 213, 217-23 (1983).

In any event, the liberty interests protected by the Due Process Clause are "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations omitted). Protected interests in property are not created by the Constitution, but rather are derived from applicable statutes, regulations, or contracts (*see Goss v. Lopez*, 419 U.S. 565, 572-73 (1975)), transcending "an abstract need or desire" or a "unilateral expectation" and qualifying as "a legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). For the reasons stated, the common law year-and-a-day rule obviously created no liberty or property interest entitling Rogers to constitutional protection.

The weight of any reliance interest petitioner might claim in the year-and-a-day rule is further diminished by the fact that it is a common law, rather than statutory, principle. The genius of the common law is its flexibility to adapt to each new situation as justice demands: "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383 (1933). The engines driving the constant evolution of the common law are " 'reason and experience.' " *Trammel v. United States*, 445 U.S. 40, 46 (1980) (quoting *Hawkins v. United States*, 358 U.S. 74, 79 (1958)). Thus, "[o]ne of its oldest maxims was that where the reason of a rule ceased the rule also ceased . . . No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself." *Funk*, 290 U.S. at 383 (quoting *Ketelsen v. Stilz*, 184 Ind. 702, 707, 111 N.E. 423, 425 (1916)).

If it is true, as these pronouncements surely illustrate, that common law evolution is a self-executing mechanism, then it must follow that principles such as the year-and-a-day rule can move into, and out of, the common law without need of formal announcement. And the consequences are fatal to any claim petitioner might make to justifiable reliance on the rule. On the level of theory, this phenomenon renders it impossible to pinpoint exactly when the year-and-a-day rule ceased to operate in Tennessee and, therefore, impossible to label the Tennessee Supreme Court's disapproval of the rule in petitioner's case truly "retroactive." The rule ceased to operate in Tennessee whenever "reason and experience" dictated its

demise. Petitioner's case merely presented the occasion for the Tennessee Supreme Court to remark upon the change. After all, as the court below noted, the year-and-a-day principle had been a part of the common law of Tennessee only in an academic sense, never having supplied the rule of decision in a single reported case and only having been mentioned in passing twice before petitioner committed his crime in 1994. Until petitioner invoked the rule, its continued viability had never been tested in the light of "reason and experience" by any Tennessee appellate court.

On a more practical plane, this characteristic flexibility of the common law should also serve as "fair warning" to those who would rely on one of its "loophole" principles like the year-and-a-day rule that they may suffer disappointment should the need ever arise to duck through the loop. Unlike a "narrow and precise" statutory provision of the sort involved in *Bouie*, which "lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction" (378 U.S. at 351-52), common law doctrine is considerably less secure, precisely because it is made by judges in the course of deciding real cases. Common law judges do not dispense justice based on a mechanical application of the "plain meaning" of the words printed in the pages of Blackstone's Commentaries. Rather, they fashion a rule suited to the particular circumstances of the case in light of their understanding of the principles of the common law, and then they apply the rule, retroactively, to decide the case. If one seeks to rely upon the

common law, he should be required to take into account the entire body of that law, including the maxim stated above that old rules give way to the demands of justice as "reason and experience" dictate. Where, as here, the only claim of entitlement to the benefits of a common law rule is based on narrow self interest, unrelated to the reasons that supported the development of the rule in the first place, one should not be heard to cry "unfair surprise" when the common law balks.

Finally, the common law origin of the year-and-a-day rule compels rejection of petitioner's complaint that he should have been entitled blindly to rely upon its continued vitality in Tennessee without taking into account the weight of authority from other jurisdictions disapproving the rule. The principles of the common law are not specific to a particular jurisdiction. They derive from a common source, England,[13] and the courts of all common law jurisdictions in the United States, like the Tennessee Supreme Court in this case, routinely invoke common law judicial decisions of other states as authority for their own decisions.[14] While, as petitioner notes, it may be the

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[13] *See generally* Herbert Pope, *The English Common Law in the United States*, 24 Harv. L. Rev. 6 (1910).

[14] *See, e.g., Woods v. Harry B. Woods Plumbing Co.*, 967 S.W.2d 768, 772 (Tenn. 1998) (abolishing common law "aggressor defense" in workers' compensation actions, relying on rejection by a "majority of jurisdictions"); *Carson v. Headrick*, 900 S.W.2d 685, 688-90 (Tenn. 1995) (reaffirming common law policemen and firemen's rule precluding firefighters and police officers from recovering damages for injuries arising out of risks peculiar to their employment, citing reaffirmation by the "vast majority of courts"); *McIntyre v. Balentine*, 833 S.W.2d 52, 55-56 (Tenn. 1992) (abolishing common law defense of contributory

"rare situation in which the meaning of a *statute* of another State sufficed to afford a person 'fair warning' that his own State's *statute* meant something quite different from what its words said" (*Bouie*, 378 U.S. at 359-60 (emphasis added)),[15] the common law decisions of each state's courts have always informed the decisions of every other state's courts called upon to apply the same principles.[16] The virtually unanimous abandonment of the year-and-a-day rule by common law courts across the country should have signaled to petitioner that Tennessee too would most likely follow the trend. *See* J.A. 17-18 n.4.

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negligence, noting shift to comparative fault in 45 states); *Dupuis v. Hand*, 814 S.W.2d 340, 344-46 (Tenn. 1991) (abolishing common law tort of alienation of affection, noting abolition or limitation in 35 states); *Hanover v. Ruch*, 809 S.W.2d 893, 897 n.6 (Tenn. 1991) (abolishing common law tort of criminal conversation, noting "clear nationwide trend" towards abolition).

[15] *But cf. Rose v. Locke*, 423 U.S. 48 (1975) (Tennessee statute prohibiting "crimes against nature" held to provide fair warning that fellatio was covered conduct, in part, because the courts of Georgia, Missouri, Maine and Florida had construed similarly-worded statutes in those jurisdictions to apply to such conduct.)

[16] Pope, *supra*, 24 Harv. L. Rev. at 15 ("Opinions in . . . cases from other jurisdictions, when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable . . . "); and at 15 n.11 ("No one, therefore, who is to engage in the practice of law anywhere in this country can safely confine his knowledge of the law to the cases of a particular jurisdiction.").

C. The Due Process Right to Fair Warning Does Not Subject Judicial Decision-Making to the Technical Restrictions Imposed by the Ex Post Facto Clause upon Penal Legislation

The Tennessee Supreme Court's application of its decision abolishing the year-and-a-day rule to petitioner's case did not violate *Bouie*'s fair warning principle because the court's action (1) did not expand the scope of the conduct covered by Tennessee's second degree murder statute, (2) did not retroactively deprive petitioner of notice that his conduct risked prosecution and punishment under that statute, and (3) did not disturb any reasonable reliance interest petitioner might have asserted in the operation of the rule as of the time he stabbed his victim or thereafter. In respondent's view, these factors should dispose of petitioner's due process claim and provide ample grounds to affirm the judgment below.

But petitioner apparently believes that *Bouie*'s due process analysis transcends mere considerations of "fair warning" and, in addition, demands that the judgment of the Tennessee Supreme Court be examined as if it had been enacted by the legislature in the form of a statute, in order to determine whether it violates the constitutional prohibition against ex post facto laws. He thus, in effect, argues that the technical restrictions placed upon retroactive penal legislation by the Ex Post Facto Clause, U.S. Const. art. I, § 10, apply with equal force to judicial decisions through the Due Process Clause of the Fourteenth Amendment.

Contrary to petitioner's assumption, *Bouie* has not already accomplished this result. Although the *Bouie* Court did observe that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely *like* an ex post facto law" (378 U.S. at 353 (emphasis added)), earlier the Court clearly identified the doctrinal source of its holding as "[t]he basic principle that *a criminal statute must give fair warning* of the conduct that it makes a crime" (378 U.S. at 351) (emphasis added), in other words, "the first essential of due process of law" (*id.*, quoting *Lanzetta, supra*) which forms the basis of the Court's "void-for-vagueness" jurisprudence under the Due Process Clause:

> *If the Fourteenth Amendment is violated* when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta [v. New Jersey, supra]*, or to 'guess at (the statute's) meaning and differ as to its application,' as in *Connally [v. General Const. Co.*, 269 U.S. 385 (1926)], *the violation is that much greater* when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

378 U.S. at 352 (emphasis added). The Court's later invocation of the Ex Post Facto Clause as additional support for its conclusion must therefore be regarded as dicta. Furthermore, other aspects of the *Bouie* opinion belie any intention to transform the Due Process Clause into a surrogate Ex Post Facto Clause regulating judicial action. For example, the Court's focus on the innocent character

of the *Bouie* defendants' conduct as a "particularly compelling" factor in its "fair warning" calculus is wholly inconsistent with Ex Post Facto Clause jurisprudence.[17] The moral quality of the defendant's conduct is irrelevant for purposes of determining whether a statute applied to punish that conduct falls within the ex post facto prohibition. *See, e.g., Carmell v. Texas*, 529 U.S. ___, 120 S.Ct. 1620 (2000) (Texas statute relaxing evidentiary requirements for sexual assault convictions deemed an ex post facto law as applied to defendant's sexual molestation of his teenage stepdaughter). Read in context, *Bouie*'s references to ex post facto principles thus reflect no more than a recognition that both constitutional provisions – the Ex Post Facto Clause and the Due Process Clause – share a common concern: the unfairness of criminalizing conduct, or of escalating its penal consequences, after the fact.

Moreover, petitioner's interpretation of *Bouie* rests on the wholly implausible premise that the Court intended to overrule two hundred years of precedent without saying so. The proposition that the Ex Post Facto Clause does not regulate judicial decision-making has been established since *Calder v. Bull, supra*, this Court's first opportunity to address the meaning of the Clause and the most authoritative exposition of the Framers' original understanding of the scope of its protections. *See Carmell*, 120 S.Ct. at 1626-29. Writing for the Court in *Calder*, Justice

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[17] "Application of the rule [forbidding unforeseeable, retroactive judicial enlargement of criminal statutes] is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral." *Bouie*, 378 U.S. at 362.

Chase expressed the view that the Framers' aim had been to restrain the power of the members of the legislative branch, whose enactments were often "stimulated by ambition, or personal resentment, and vindictive malice" (3 U.S. (3 Dall.) at 389): " . . . [T]he plain and obvious meaning and intention of the prohibition is this; that *the Legislatures* of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390 (emphasis added). In a separate opinion Justice Paterson addressed the claim that the Connecticut resolution at issue in *Calder* had been enacted in the legislature's exercise of its pre-Revolutionary War judicial powers. He too recognized that the Ex Post Facto Clause reflects the Framers' distrust of the "bold, unprincipled, aspiring, and party men" (*id.* at 396) who typically inhabit legislative bodies, but he cautioned that "if the Legislature of the State . . . acted in their customary judicial capacity . . . there is an end of the question." *Id.* at 395. Justice Iredell echoed this view (*id.* at 400) ("if the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution"), as did Justice Cushing. *Id.* ("If the act is a judicial act, it is not touched by the Federal Constitution."). In the two centuries since *Calder*, this Court has never questioned the views expressed by these four Justices that the Ex Post Facto Clause regulates penal legislation, not court decisions. *See, e.g., Frank v. Mangum*, 237 U.S. 309, 344 (1915) ("the constitutional prohibition . . . is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."); *Ross v. Oregon*, 227 U.S. 150, 161 (1913) ("But . . . [the Ex Post Facto Clause],

according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws, not their construction by the courts.").

Petitioner offers no persuasive reason why this well-settled limitation on the scope of the ex post facto prohibition should now be abandoned under cover of the Due Process Clause of the Fourteenth Amendment. Although he speculates that "[s]tate supreme courts which are politically accountable to the electorate may be susceptible to the same kind of influences which justify the ex post facto limitations placed on legislatures" (Brief at 16), he cites no social or political science data to support that extraordinary charge, or even anecdotal evidence that the country's state appellate courts are now populated by men and women who menace our liberty through decisions "stimulated by ambition, or personal resentment, and vindictive malice." *Calder*, 3 U.S. (3 Dall.) at 389. Petitioner's argument also fails to appreciate the fundamental institutional distinction between legislatures and courts, as well as the relevance of that distinction to the values protected by the Ex Post Facto Clause:

> . . . [T]he policy of the prohibition against ex post facto legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons. *That this policy is inapplicable to decisions of the courts seems obvious: their opportunity for discrimination is more limited than the legislature's in that they can only act in construing existing law in actual litigation.*

James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part) (emphasis added). *Cf. Richmond v. J. A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring) ("The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish . . . past conduct of private citizens," whereas "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that . . . would have existed had no wrong been committed.").[18]

This Court's steadfast refusal to extend the technical requirements of the ex post facto prohibition beyond the legislative arena serves other important interests that petitioner ignores. As Justice Harlan warned in his separate opinion in *James*, *supra*:

> Given the divergent pulls of flexibility and precedent in our case law system, it is disquieting to think what perplexities and what subtleties of distinction would be created in applying this policy, which so properly limits legislative action, to the decisions of the courts.

366 U.S. at 247 n.3 (Harlan, J., concurring and dissenting). Most obviously, petitioner's view would open up a

[18] *See also* Dan M. Kahan, *Some Realism About Retroactive Criminal Lawmaking*, 3 Roger Wms. U. L. Rev. 95, 112, 116 (1997) (noting that the Ex Post Facto Clause operates "to counteract the legislative bias toward severity" in the field of criminal legislation, which does not infect judges, who, by training, experience and institutional tradition "take . . . a longer view of the task of criminal lawmaking".)

boundless new frontier of litigation in criminal cases, since every judicial interpretation of the language of a criminal statute, every judicial modification of a principle of evidence, and every judicial sentencing determination might support a colorable ex post facto claim if applied to the disadvantage of the defendant in the case before the court. And, quite apart from concerns of judicial economy, the implications for the proper maintenance of the federal-state balance are even more serious. By subjecting judicial decision-making to Ex Post Facto Clause scrutiny, petitioner would transform state court rulings on a vast array of purely state law matters into issues of federal constitutional significance warranting intrusive federal court supervision. Indeed, it was precisely this objection that led the Court to decline a similar invitation to apply Article I, § 10's parallel Contracts Clause to state court decisions:

> It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us [by U.S. Const. art. I, § 10] is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary.

Commercial Bank of Cincinnati v. Buckingham, 46 U.S. (5 How.) 317, 343 (1847). Finally, the presumption of retroactivity that has historically applied to judicial decisions[19] –

[19] *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993) ("Nothing in the Constitution alters the fundamental rule

and that petitioner would completely abolish in the criminal context – reinforces the horizontal separation of powers by forcing courts to focus upon the impact of their rulings on the litigants before them, thus discouraging departures from prior precedent and thereby serving as "one of the understood checks on judicial lawmaking." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); *see also* Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 Roger Wms. U. L. Rev. 35, 82 (1997) ("Retroactive application of all new judicial rulings raises the price of change, for judges must be willing to alter the rights not only of the parties before them, but of all similarly situated litigants. When judges recognize that any departure from the status quo has problematic consequences, then they may be more chary of change."). Regulating judicial decision-making under the Ex Post Facto Clause would jeopardize all of these values.

D. Even If the Decision Below Were Reviewed Under the Standards Applicable to Retroactive Penal Legislation, There Would Be No Constitutional Violation

In any event, the decision below would not offend the Ex Post Facto Clause if that provision were applicable to court decisions. The ex post facto prohibition forbids:

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of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' ") (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. (3 Dall.) at 390.

The Tennessee Supreme Court's retroactive abolition of the year-and-a-day rule does not violate the first category. Petitioner's actions plainly fell within the ambit of Tennessee's second degree murder statute, which proscribes the "knowing killing of another"; his actions were not "innocent when done." The abolition of the rule did not expand the definition of the crime, because the statutory offense does not require either that the victim die within any particular time frame or that the perpetrator know the victim will die within a particular time frame. As we have already discussed, the year-and-a-day rule was neither an element of the crime of homicide under Tennessee law nor a defense to a charge of homicide.

Petitioner's claim that the decision below violates *Calder*'s second and third categories rests upon the erroneous premise that a crime other than the one for which he was actually indicted, convicted and punished should serve as the "benchmark" crime for purposes of determining whether there has been unconstitutional retroactive aggravation of the offense or enhancement of

punishment. Petitioner correctly notes that, until his victim died, he could only have been charged with an attempted homicide or an assault. Since death occurred more than a year and one day after the attack, the argument continues, the abolition of the rule should be viewed both as having aggravated his offense – from one of these lesser offenses into homicide – and as having increased the punishment that his actions warranted under the law in effect at the time he stabbed the victim. But the statutory offense for which petitioner was indicted, convicted and punished was second degree murder. Obviously, the crime was not consummated until the victim died. That crime is not defined by the timing of the victim's death but, on its face, applies to any "knowing killing of another." The abolition of the year-and-a-day rule did not make that offense "greater" in any sense and did not increase the punishment that may be imposed upon conviction for second degree murder. After the decision below, second degree murder remains a "Class A" felony in Tennessee (Tenn. Code Ann. § 39-13-210(b) (1991 & 1997)), punishable by not less than 15 nor more than 60 years' imprisonment and a fine not to exceed $50,000. Tenn. Code Ann. § 40-35-111(b)(1) (1991 & 1997).

The only *Calder* category implicated by the abolition of the year-and-a-day rule, had it been accomplished by statute, is the fourth, for, as this Court has recognized (*see Louisville, E. & St. L. R. Co. v. Clarke, supra*), and as the opinion below plainly indicates (J.A. 17-21), the rule operated at common law as a principle of evidence whose purpose was to foreclose the possibility of proving causation in homicide cases if the victim died beyond a year

and one day after his initial injury. But the abolition of the rule does not allow a homicide conviction in Tennessee on "less, or different, testimony" than previously required. *Calder*, 3 U.S. (3 Dall.) at 390. First, the year-and-a-day rule did not specify a particular "quantum of evidence" necessary to establish causation. *Compare Carmell, supra* (Texas statute eliminating the need for corroboration of child sex abuse victim's testimony, required by prior law to support a conviction for the offense, is ex post facto under *Calder*'s fourth category as applied to offense committed before the change.) Its concern was temporal, not quantitative. Thus, in no sense is "less proof" of causation, "in amount or degree," now made legally sufficient to prove that element of homicide as a result of the elimination of the rule. *Hopt v. Utah*, 110 U.S. 574, 590 (1884). The State must still prove causation beyond a reasonable doubt.

Nor does the abolition of the rule mean that evidence of a "different" type may suffice to carry the State's burden. Now, as before, testimonial and/or physical evidence must establish, beyond a reasonable doubt, both that the defendant knowingly injured the victim and that the victim died as a result of that injury. The sole impact of the rule's abolition is to eliminate a wholly arbitrary and irrational restriction, based on nothing more than the timing of the victim's death, which was formerly imposed on the admissibility of otherwise reliable, competent proof of causation. Alterations in rules of evidence, which "simply enlarge the class of persons who may be competent to testify," but which "leav[e] untouched the nature of the crime and the amount or degree of proof essential to conviction," do not violate the Ex Post Facto Clause as

applied to prosecutions for crimes committed before the change. *Hopt*, 110 U.S. at 589-90. That is precisely the situation presented here. The abolition of the year-and-a-day rule "simply allows the State the opportunity to attempt to prove causation" (J.A. 21); it does not authorize conviction on any less proof.

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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